90-1137

NO. 90-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

AL C. PARKE, WARDEN — Petitioner

- versus -

NATHAN VERNON GILLENWATER — Respondent

Petition for Writ of Certiorari to the
United States Court
of Appeals for the Sixth Circuit

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QUESTION PRESENTED FOR REVIEW

1. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN HOLDING A ONE SENTENCE DENIAL OF A MOTION FOR DISCRETIONARY REVIEW BY KENTUCKY'S HIGHEST COURT (SILENT AS TO THE REASONS FOR THE COURT'S DENIAL OF REVIEW) WAS AN OPINION OF THE LAST STATE COURT RENDERING A JUDGMENT IN THE CASE AND WOULD PRECLUDE CAUSE AND PREJUDICE ANALYSIS EVEN THOUGH THE STATE'S INTERMEDIATE APPELLATE COURT IN THE ACTUAL EXERCISE OF APPELLATE REVIEW AFFIRMED THE JUDGMENT PREMISING ITS OPINION SOLELY UPON THE PRISONER'S PROCEDURAL DEFAULT.

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NO. 90-

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October Term, 1990

AL C. PARKE, WARDEN — Petitioner

- versus -

NATHAN VERNON GILLENWATER — Respondent

Petition for Writ of Certiorari to the
United States Court
of Appeals for the Sixth Circuit

Al C. Parke, Warden, petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The order of the United States Court of Appeals for the Sixth Circuit (Nathan Vernon Gillenwater v. Al C. Parke, Warden, 89-6239, Appendix at 1a - 4a) is unpublished. Likewise, the opinion of the Kentucky Court of Appeals (Nathan Vernon Gillenwater v. Commonwealth of Kentucky, 88-CA-476-MR, Appendix at 17a - 19a) is unpublished. [Kentucky Supreme Court orders denying discretionary review are not published].

JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was rendered on August 8, 1990 (Appendix at 1a - 4a). The warden's petition for rehearing with a suggestion for rehearing en banc was denied by order of the United States Court of Appeals for the Sixth Circuit entered on October 16, 1990 (Appendix at 25a - 26a). The jurisdiction of this Court to review the order of the United States Court of Appeals for the Sixth Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

ARTICLE III.

Judicial Department

"Section 2. Extent of Judicial Power; Supreme Court; Time and Places of Trial.

The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all Cases affecting Ambassadors, other public Ministers and Consuls; -- to all Cases of admiralty and

maritime Jurisdiction; -- to Controversies to which the United States shall be a Party; -- to Controversies between two or more States; -- between a State and Citizens of another State; -- between Citizens of different States; -- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

AMENDMENT X

[Rights Reserved to State]

Rights reserved to states or people. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XIV

[Citizen's Rights]

Section 1. Citizenship; Due process; Equal Protection.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. Power to enforce amendment.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U.S.C. § 2254

[Appended Pursuant to Rule 14.1(F)]

STATEMENT OF THE CASE

Respondent was indicted in Carter County, Kentucky on February 23, 1979, for capital murder and kidnapping. On April 8, 1980, respondent entered a plea of guilty to the murder charge and judgment was entered, sentencing respondent to a life sentence (see Joint Appendix at A-103).[1]

In January, 1981, respondent filed a state court motion to vacate pursuant to Ky.R.Crim.P. 11.42 (see Jt. App., A-78 - A-96). That motion was denied by the Carter Circuit Court on March 7, 1981 (see Jt. App. at A-76) and no appeal was filed therefrom.

In September, 1987, respondent filed a second Ky.R.Crim.P. 11.42 motion (see Jt. App. A-45-75). That motion was summarily denied as successive (see Jt. App. A-43). An appeal was

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[1]As used herein, references to the record in this case are to the Joint Appendix as it appears in the record on appeal to the United States Court of Appeals wherein are excerpted and appended pertinent portions from the state and federal court actions. In addition, there is a separately designated appendix to this petition (referred to simply as appendix) as required by Rule 14.1(K).

taken therefrom and the Kentucky Court of Appeals affirmed the trial court denial solely because of respondent's procedural default under Ky.R.Crim.P. 11.42(3) (Appendix 17a-19a).

Respondent then filed a motion for discretionary review which was denied by the Kentucky Supreme Court in a one sentence pro forma order (Appendix 16a).

A 28 U.S.C. § 2254 petition for a writ of habeas corpus followed (see Jt. App. A-14 - A-20). Consistent with local practice, the petition was submitted to the United States Magistrate for initial consideration. Petitioner herein answered and specifically raised the above-described procedural default and argued that Gillenwater had failed to show "cause and prejudice" (Jt. App. A-22). The magistrate recommended the petition be denied, citing Gillenwater's procedural default and failure to show "cause and prejudice" (Jt. App. at A-9). The United States District Court for the Eastern District of Kentucky then conducted its review and adopted the magistrate's findings and recommendations (Jt. App. at A-5).

An appeal to the United States Court of Appeals for the Sixth Circuit followed and on August 8, 1990, a three judge panel summarily ruled under Rule 9(b)(6), Rules of the Sixth Circuit that the judgment of the district court be vacated and the case remanded to the district court because "the Kentucky Supreme Court in denying discretionary review of [Gillenwater's] second Rule 11.42 motion, did not clearly and expressly base its ruling upon Gillenwater's procedural default. See Harris v. Reed, 109 S.Ct. 1038, 1043 (1989); Hill v. McMackin, 893 F.2d 810, 813-14 (6th Cir. 1989) (Appendix 4a).

Petitioner then timely filed a petition for rehearing with a suggestion for rehearing en banc arguing that by the denial of discretionary review, the Kentucky Supreme Court only declined to exercise its discretionary jurisdiction and did not render a judgment on the record. The petition for rehearing was denied on October 16, 1990 (Appendix 25a-26a) and mandate issued October 24, 1990.[2]

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[2]Petitioner has been denied by the United States Court of Appeals for the Sixth Circuit,

REASONS FOR GRANTING WRIT

Several important and special reasons exist for granting review of the order of the United States Court of Appeals for the Sixth Circuit.

(1) The order of the Court of Appeals for the Sixth Circuit sought to be reviewed is in conflict with a published opinion of the United States Court of Appeals for the Fifth Circuit in the case of Goodwin v. Collins, 910 F.2d 185 (5th Cir. 1990).[3] See also McQuown v. McCartney, 795 F.2d 807, 809-810 (9th Cir. 1986) entered prior to Harris v. Reed, 489 U.S. 255 (1989) wherein the Ninth Circuit ruled similarly to the Fifth Circuit that summary denial by a state supreme court is not a decision on the merits.

In Goodwin v. Collins, supra, at 187, the Fifth Circuit noted "the Harris court's reference to "the last state court rendering a

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[2]Continued - a motion to recall its mandate based upon petitioner's good faith intent to file this petition.

[3]Petition for Writ of Certiorari is now pending before this Court. Goodwin v. Collins, 90-6539.

judgment in the case" should be understood to refer to the state court whose judgment would be reviewed if direct review had been granted in the United States Supreme Court." In Goodwin the intermediate state appellate court rendered a written opinion and the state supreme court simply denied discretionary review without written opinion. Likewise, in this case, the Kentucky Court of Appeals rendered a written opinion (relying solely upon procedural grounds) and the Kentucky Supreme Court did no more than decline to exercise its discretionary review. The Kentucky Court of Appeals, like its Texas counterpart, is the last state court rendering a judgment.

The facts in the two cases are the same. Yet, the holding of the respective federal appellate courts are in conflict with one another. There is, therefore, a special and important reason for this Court to grant the writ of certiorari. See Rule 10.1(a).

(2) The order of the Sixth Circuit also renders a decision on an important question of

federal law which has not but should be resolved by this Court. The critical consideration prior to requiring cause and prejudice analysis in cases of procedural default is the holding of the last state court rendering judgment in the case. See Harris v. Reed, supra. However, the question remains what constitutes a state court rendering judgment in the case.

The answer to that question should be obvious. Yet, at least two Circuits have reached contrary conclusions as is evident by comparison of this case with Goodwin, supra. Also, this Court has pending before it, the case of Ylst v. Nunnemaker, cert. granted ____ U.S. ____, 111 S.Ct. 384 (1990). In Nunnemaker v. Ylst, 904 F.2d 473, 476 at footnote 4 (9th Cir. 1990), the circuit court noted the express limitation of its ruling to cases where original actions are denied by the state supreme court. Unanswered by the Ninth Circuit is whether a silent state supreme court opinion in the exercise of appellate review is a decision on the merits in the post-Harris v. Reed era. Compare McQuown v. McCartney, supra.

Many states now have intermediate appellate courts, thus orders denying review by state supreme courts are apt to be silent. The question of whether a silent order is in fact a judgment in the case is, therefore, an important federal question in the context of Harris v. Reed, supra. This is a special and important reason for granting the writ. See Rule 10.1(c).

(3) The order of the United States for the Sixth Circuit misconstrues the nature of the state supreme court's pro forma order and gives an interpretation thereto which conflicts, at least in spirit, with Ky.R.Civ.P. 76.20(9)(a). Ky.R.Civ.P. 76.20(9)(a) in pertinent part states ". . . The denial of a motion for discretionary review does not indicate approval of the opinion or order sought to be reviewed and shall not be cited as connoting such approval." The reason for this rule is apparent from Ky.R.Civ.P. 76.20(1) which provides ". . . Such review is a matter of judicial discretion and will be granted only when there are special reasons for it."

A motion for discretionary review in Kentucky is a threshold motion and is not a review of the record. To call the denial of review a judgment in the case gives far greater connotation to denial than Ky.R.Civ P. 76.20(9)(a) permits.

The denial of a motion for discretionary review is not a judgment in the case. The Kentucky Supreme Court only declined to exercise its discretionary jurisdiction. The order denying states only, "The motion of the movant for a review of the decision of the Court of Appeals is denied." (Appendix 16a). This is a denial of a motion and not a review of the case.

There should be no imputed review of the case as the order clearly states only that "a review of the decision of the Court of Appeals is denied." (Appendix 16a). It should further be understood review of the motion is not a review on the record as Ky.R.Civ.P. 76.20(4) specifically limits the record on the motion to the judgment and opinion of the lower court. Although allowed by the rule in this case the record was not otherwise expanded.

This is neither a Michigan v. Long, 463 U.S. 1032 (1983) nor Harris v. Reed, supra case. In each of those cases, there was ambiguity in the opinion of a court actually exercising its appellate jurisdiction. Here there is no ambiguity in the opinion of the one state court which actually conducted review.

The denial of a state court motion for discretionary review is no different than a denial of a petition for writ of certiorari in this Court. Denial of a petition for a writ of certiorari does not supplant an opinion of the Court of Appeals. Denial of the petition means only "this Court has refused to hear the case." Darr v. Burford, 339 U.S. 200, 226 (1950) (Frankfurter, J. dissenting). Denial of the petition carries no legal significance. Brown v. Allen, 344 U.S. 443, 489-97 (1953).

A petition for writ of certiorari is granted only if there are "special and important reasons." See Rule 10.1. Likewise, a motion for discretionary review will only be granted for "special reasons." Ky.R.Civ.P.

76.20(1). To call either a review of the case is a misnomer.

Yet, the order of the United States Court of Appeals for the Sixth Circuit for which review is sought herein, gives the denial of discretionary review artificial construction. This construction conflicts with Ky.R.Civ.P. 76.20(9)(a) as adopted by the Kentucky Supreme Court. Clearly this is a special and important reason for granting review. See Rule 10.1(a).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

No. 89-6239

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATHAN VERNON GILLENWATER	)	Filed August 8, 1990
	)	Leonard Green,
Petitioner-Appellant	)	Clerk
	)	
v.	)	O R D E R
	)	
AL C. PARKE, Warden	)	
	)	
Respondent-Appellee.	)	

BEFORE: MILBURN and GUY, Circuit Judges; and JORDAN, District Judge.*

Nathan Vernon Gillenwater, a pro se Kentucky prisoner, appeals the district court's dismissal of his petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the record and the briefs, this panel unanimously

*The Honorable Leon Jordan, U.S. District Judge for the Eastern District of Tennessee, sitting by designation.

agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In 1980, Gillenwater pleaded guilty to murder and was sentenced to life imprisonment. In 1981, Gillenwater filed a motion for post-conviction relief pursuant to Ky. R. Crim. P. 11.42, which the trial court denied. He did not appeal the ruling. Thereafter, in 1987, Gillenwater filed his second Rule 11.42 motion. The trial court denied the motion finding that it did not present any issues different from those asserted in the first Rule 11.42 motion. The Kentucky Court of Appeals affirmed the judgment on procedural grounds finding that review of the claims was barred because Gillenwater could have raised the issues in his first Rule 11.42 motion. The Kentucky Supreme Court denied discretionary review.

Gillenwater then filed his habeas petition alleging: (1) his plea was involuntary because he was not advised of his constitutional rights; (2) he received

ineffective assistance of counsel; (3) the plea was involuntary because he was on mind-altering drugs at the time he entered his plea; and (4) the trial court did not hold a hearing to determine if he could distinguish right from wrong at the time of the offense. Utilizing a cause and prejudice analysis, the magistrate recommended that the petition be denied finding that Gillenwater had waived review of the claims because he did not present them to the Kentucky courts in his first Rule 11.42 motion. The magistrate also found that the case did not present any exceptional circumstances to exempt the application of the cause and prejudice requirement. The district court adopted the magistrate's recommendation over Gillenwater's objections.

On appeal, Gillenwater reasserts his claims, requests the appointment of counsel and argues that the district court erred in applying a cause and prejudice analysis in this case.

Upon review, we shall vacate the district court's judgment and remand the case for further proceedings. The district court erred in utilizing a cause and prejudice analysis in this case because the Kentucky Supreme Court, in denying discretionary review of petitioner's second Rule 11.42 motion, did not clearly and expressly base its ruling upon Gillenwater's procedural default. See Harris v. Reed, 109 S.Ct. 1038, 1043 (1989); Hill v. McMackin, 893 F.2d 810, 813-14 (6th Cir. 1989). Consequently, the district court should address the merits of the action because Gillenwater's procedural default does not bar consideration of his federal claims on habeas review.

Accordingly, the request for counsel is denied, and the district court's judgment is hereby vacated and the case remanded pursuant to Rule 9(b)(6), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

Filed Sept. 14, 1989
Leslie G. Whitmer, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND

CIVIL ACTION NO. 89-50

NATHAN VERNON GILLENWATER, PETITIONER,

VS. ORDER

AL C. PARKE, WARDEN, RESPONDENT.

Nathan Vernon Gillenwater has filed a pro se petition for a writ of habeas corpus under 28 U.S.C. §2254. Consistent with local practice, this action has been referred to United States Magistrate Joseph M. Hood for initial scrutiny. The Magistrate has recommended that the petition be denied and the cause striken from the docket. Petitioner has filed objections.

Mr. Gillenwater pleaded guilty to capital murder in Carter Circuit Court. The Kentucky Court of Appeals affirmed the denial of post-conviction relief on procedural grounds and the Kentucky Supreme Court declined to take discretionary review.

As stated in the Magistrate's report, petitioner has failed to show "cause" for the procedural default, "prejudice attributable thereto" or a "fundamental miscarriage of justice." Mr. Gillenwater's objections contain nothing that would warrant a conclusion different from that recommended by the Magistrate.

Accordingly,

IT IS THEREFORE ORDERED AND ADJUDGED:

(1) That the Magistrate's report and recommendation is hereby approved and adopted as and for the opinion of the Court;

(2) That in conformity with the recommendation, the petition is DENIED;

(3) That the petition is DISMISSED and shall be STRICKEN from the docket.

This 15th day of September, 1989.

/s/ Henry R. Wilhoit, Jr.

HENRY R. WILHOIT, JR., JUDGE

Filed June 6, 1989
Leslie G. Whitmer, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND

CIVIL ACTION NO. 89-50

NATHAN VERNON GILLENWATER, PETITIONER,

VS: MAGISTRATE'S REPORT AND RECOMMENDATION

AL C. PARKE, WARDEN, RESPONDENT,

Nathan Vernon Gillenwater has filed a pro se motion for a writ of habeas corpus under 28 U.S.C. §2254. The matter is before the court on the respondent's motion to dismiss or, in the alternative, for summary judgment. Consistent with local practice, it has been referred to the undersigned for initial consideration and a report and recommendation. 28 U.S.C. §636(b)(1)(B).

Gillenwater was indicted in the Carter Circuit Court on February 23, 1979 and charged with capital murder. Although he initially pled not guilty to the charge, pursuant to a plea agreement, he changed his plea to guilty on April 8, 1980. In return, the prosecutor

recommended that Gillenwater be sentenced to life imprisonment.[1] The presiding judge imposed the recommended sentence.

Less than a year later, on January 20, 1981, Gillenwater sought post-conviction relief under RCr 11.42, Ky.R.Crim.P. That motion was denied. No appeal was taken.

A second RCr 11.42 motion was filed on August 7, 1987. The court denied the motion, pointing out that the issues raised in the second motion were no different than those presented in the first. See RCr 11.42(3). Although no appeal was taken, the Kentucky Court of Appeals affirmed the Carter Circuit Court, adhering to the principle that issues which were or could have been raised in the initial RCr 11.42 motion cannot be raised by subsequent motions. A motion for discretionary review by the Kentucky Supreme Court was likewise denied.

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[1] A charge of kidnapping was also dismissed.

In his present §2254 petition, Gillenwater has raised several issues. He claims that: (1) his plea of guilty was not voluntarily and intelligently entered as he was never advised of the rights he was waiving by entering a guilty plea; (2) he was denied effective assistance of counsel; (3) his plea was not voluntarily and intelligently entered as he was on mind altering and depressant drugs when he entered his plea; and (4) the trial court fialed to conduct a hearing, as mandated by KRS 504.040, to determine whether he knew right from wrong, due to extreme intoxication, at the time of the crime.

At the outset, the undersigned must note that the merits of the petitioner's instant claims have never been addressed by the Kentucky appellate courts. Instead, the Kentucky appellate courts chose to reject Gillenwater's claims on procedural grounds, viz., that issues which were or could have been raised in Gillenwater's first RCr 11.42 motion could not be raised in a subsequent

motion.[2] Where there is plain reliance on such a procedural default by the petitioner, see Harris v. Reed, 489 U.S. ___, 109 S.Ct. ____, 44 CrL 3120 (1989); Maupin v. Smith, 785 F.2d 135, 138 (6th Cir. 1986), a federal habeas court may consider the issues presented only if the petitioner can show "cause" for the default and "prejudice attributable thereto". Murray v. Carrier, 477 U.S. 478, 485 (1986), or demonstrate that failure to consider the federal claims will result in a "fundamental miscarriage of justice." Id. at 495. quoting Engle v. Issac, 456 U.S. 107, 135 (1982).

The petitioner has made no attempt to show "cause" for the procedural default and

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[2] The state does not seek dismissal of Gillenwater's petition on the basis of his failure to exhaust his state remedies. Such a motion would have no merit since Gillenwater lacks available state remedies. See, e.g., Stamps v. Rees, 834 F.2d 1269, 1274 (6th Cir. 1987), cert. denied, ____ U.S. ____, 108 S.Ct. 1279 (1988).

"prejudice attributable thereto." He seems to argue that a "fundamental miscarriage of justice" will occur unless his claims are considered. However, review of the record reveals no basis for concluding that Gillenwater was "actually innocent." Murray, 477 U.S. at 496.

The Commonwealth was prepared to prove that: (1) Gillenwater and the deceased -- a waitress who was reported missing from her job -- were from Huntington, West Virginia, miles from the site where the victim's hacked and virtually decapitated body was found; (2) Gillenwater, with fresh blood on his face and clothes, was identified by three people as being at or near the abandoned farmhouse in remote Carter County shortly before the victim's body was discovered there; and (3) Gillenwater had the victim's watch in his pocket when arrested the following day. [State Court Record (SCR), pp. 33-38]. In light of this evidence, Gillenwater's attorney gave notice of intent to use the defense of

"mental disease or defect in exculpation of criminal conduct. . . ." [SCR, p. 55]. Pursuant to counsel's request [SCR, p. 57], the court ordered that Gillenwater undergo a psychiatric evaluation. [SCR, p. 59].

Subsequently, the Carter Circuit Court received a report from the examining psychiatrist which, inter alia, stated: "At the present time, this patient is well aware of his charges, he knows the court proceedings and he is able to aid his lawyer. Mr. Gillenwater is competent to stand trial." [SCR, pp. 87 and 182]. A hearing was scheduled. [SCR, pp. 87-88 and 95-96.]

Before the hearing was conducted, Gillenwater, through counsel, moved the court to change his plea. [SCR, p. 101]. On the appointed date, Gillenwater appeared with counsel, Robert L. Caummisar. During the colloquy between the presiding judge, Gillenwater and Caummisar, it was determined that Gillenwater: (1) knew that his case was set for trial; (2) had discussed the case,

including the facts and the charges, with Caummisar; (3) desired no further time to discuss the case with his attorney; (4) was satisfied with the advice Caummisar had provided; (5) knew that a recommendation by the Commonwealth or anyone else would not be binding on the court; (6) was aware that the penalty for murder was either life imprisonment or death; and (7) wanted to plead guilty. [SCR, pp. 107-109].

Given the foregoing, the undersigned believes that the "totality of circumstances surrounding the plea", Sparks v. Sowders, 852 F.2d 882, 885 (6th Cir. 1988), demonstrates that Gillenwater made a voluntary and intelligent choice among the alternatives open to him. North Carolina v. Alford, 400 U.S. 25, 31 (1970).

Gillenwater has submitted the psychiatrist's report. That report, as noted above, contains the opinion that Gillenwater was competent to stand trial. It contains further statements regarding his mental status

at the time of the crime: "At the time of the alleged crime, this patient was highly intoxicated with alcohol or drugs, or alcohol and drugs. There is the probability that this patient was suffering from Acute Brain Syndrome and did not know right from wrong, if there is evidence that he was highly intoxicated at the time of the alleged crime." [SCR, p. 183]. From this, Gillenwater argues that Caummisar failed to investigate this viable insanity defense, thereby rendering ineffective assistance.

Although the physician did opine that Gillenwater was probably suffering from an acute brain syndrome, his opinion was hardly unequivocal. Indeed, he stated that it depended on whether there was evidence that Gillenwater was highly intoxicated at the time of the crime, a factual question that would have been one for the jury to resolve in light of all the evidence at trial including the testimony of those who saw him at or near where the victim's body was discovered. In

other words, the psychiatrist's opinion, if presented to the factfinder, would not have demanded a verdict of acquittal.

Accordingly, it is recommended that Gillenwater's petition for a writ of habeas corpus be denied and that this cause be stricken from the docket.

Particularized objections to this Report and Recommendation must be filed within ten (10) days of the date of service of the same or further appeal is waived. Thomas v. Arn, 728 F.2d 813 (6th Cir. 1984), aff'd, 474 U.S. 140 (1985); Wright v. Holbrook, 794 F.2d 1152, 1154-55 (6th Cir. 1986). A party may file a response to another party's objections within ten (10) days after being served with a copy thereof. Rule 72(b), Fed.R.Civ. P.

This the 6th day of June, 1989.

/s/ Joseph M. Hood
JOSEPH M. HOOD
UNITED STATES MAGISTRATE

Date of Entry and Service:

SUPREME COURT OF KENTUCKY
89-SC-04-D
(88-CA-476)

NATHAN V. GILLENWATER MOVANT

v. CARTER CIRCUIT COURT
NO. 79-CR-01

COMMONWEALTH OF KENTUCKY RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion of the movant for a review of the decision of the Court of Appeals is denied.

ENTERED March 8, 1989.

/s/ Robert F. Stephens
Chief Justice

Rendered December 9, 1988 10:00 a.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
No. 88-CA-476-MR

NATHAN VERNON GILLENWATER APPELLANT

v. APPEAL FROM CARTER CIRCUIT COURT
HONORABLE SAMUEL LONG, JUDGE
CRIMINAL ACTION NO. 79-CR-001

COMMONWEALTH OF KENTUCKY APPELLEE

AFFIRMING

* * * * *

BEFORE: LESTER, REYNOLDS and WEST, Judges.

LESTER, JUDGE. This is an appeal from the denial of relief sought pursuant to a second motion under RCr 11.42.

On April 8, 1980, Gillenwater was sentenced to life imprisonment upon a plea of guilty to a charge of murder. On January 20, 1981, he filed his first motion to vacate the judgment pursuant to the rule cited. This was denied and no appeal taken. On August 7, 1987, Gillenwater filed his second motion to vacate which was denied on November 18 of the

same year. In its order, the court pointed out that the second effort contained nothing that differed from the first, which would require an evidentiary hearing. This appealed followed.

Based upon RCr 11.42(3), this jurisdiction adheres to the principle that:

> This court was held upon numerous occasions that issues which could have been presented in an initial motion to vacate cannot be raised by subsequent motions. Satterly v. Commonwealth, Ky., 441 S.W.2d 144 (1969); Hampton v. Commonwealth, Ky., 454 S.W.2d 672 (1970); Case v. Commonwealth, Ky., 467 S.W.2d 367 (1971); Butler v. Commonwealth, Ky., 473 S.W.2d 108 (1971); and Lycans v. Commonwealth, Ky., 511 S.W.2d 232 (1974). Crick v. Commonwealth, Ky., 550 S.W.2d 534, 535 (1977).

See also Holt v. Commonwealth, Ky., 525 S.W.2d 660 (1975) and Schooley v. Commonwealth, Ky.App., 556 S.W.2d 912 (1977).

A review of the record conclusively demonstrates that there is nothing contained in the second motion that could not have been raised in the 1981 RCr 11.42.

The judgment is affirmed.

ALL CONCUR.

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ATTORNEYS FOR APPELLEE:

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COMMONWEALTH OF KENTUCKY
CARTER CIRCUIT COURT
79-CR-001

NATHAN VERNON GILLENWATER MOVANT

V: ORDER

COMMONWEALTH OF KENTUCKY RESPONDENT

Movant, Nathan Vernon Gillenwater, filed motions under RCr 11.42 to vacate or set aside Sentence, Appointment of Counsel and Full Evidentiary Hearing. The Commonwealth has filed a response. The Court being sufficiently advised finds as follows:

1. Movant entered a guilty plea on a murder charge in Carter Circuit Court on April 8, 1980, and is serving a life sentence in prison.

2. Movant filed a RCr 11.42 Motion in Carter Circuit Court on February 14, 1981, that contended his plea was involuntary and that he received ineffective assistance of counsel.

3. The Carter Circuit Court overruled the movant's motion on March 6, 1981.

4. Movant filed a RCr 11.42 motion in Carter Circuit Court on March 6, 1987, as renewed on November 13, 1987, that contended his plea was involuntary and that he received ineffective assistance of counsel.

5. Movant's motions of 1987 present no new issue from 1981 motion to be reviewed by the Court that requires an evidentiary hearing pursuant to RCr 11.42 (3).

IT IS HEREBY ORDERED that Movant's motions, pursuant to RCr 11.42 are hereby OVERRULED.

This the 18th day of November, 1987.

/s/ H. Samuel Long
JUDGE, CARTER CIRCUIT COURT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order was on this day mailed, postage pre-paid, to Mr. Nathan Vernon Gillenwater, Kentucky State Reformatory, LaGrange, Kentucky 40032, and the Hon. Robert A. Hutchinson, Commonwealth's Attorney, P.O. Box 574, West Liberty, Kentucky 41472.

This 18th day of November, 1987.

ROY T. GEE, CLERK
CARTER CIRCUIT COURT

BY: /s/_____. D.C.

Filed 03-07-81
Roy T. Gee, Clerk
Carter Circuit Court

CARTER CIRCUIT COURT

NATHAN GILLENWATER MOVANT

VS: ORDER OVERRULING MOTION TO VACATE OR SET ASIDE SENTENCE

COMMONWEALTH OF KENTUCKY RESPONDENT

The Movant having filed Motion herein to Vacate or Set Aside Sentence. The Court being sufficiently advised; IT IS HEREBY ORDERED that said motion, be and the same is hereby OVERRULED.

It is further orders and findings of the court that said Motion filed under the provisions of RCr 11.42 does not require an evidentiary hearing based upon the record and the knowledge of the court in regard to the same.

Given under my hand this the 6th day of March, 1981.

JUDGE, CARTER CIRCUIT COURT

CERTIFICATION

This will certify that a true copy of the foregoing Order was this date mailed to Hon. Robert Hutchinson, Commonwealth Attorney, West Liberty, KY 41472 and to Mr. Nathan Gillenwater, P.O. Box 188, LaGrange, KY 40031.

This the 9th day of March, 1981.

/s/_____
CLERK, CARTER CIRCUIT COURT

Filed October 16, 1990
Leonard Green, Clerk

No. 89-6239

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATHAN VERNON GILLENWATER, Petitioner-Appellant,	)	
v.	)	O R D E R
AL C. PARKE, WARDEN, Respondent-Appellee	)	

BEFORE: MILBURN and GUY, Circuit Judges; and JORDAN*, United States District Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

*Hon. Leon Jordan sitting by designation from the Eastern District of Tennessee

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk.

§2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by an available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit -

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by th State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding, or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one mor more of the circumstances respectively set forth in paragraphs numbered

(1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances that weight shall be given to the State court's factual determination.

(f) A copy of the official record of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(June 25, 1948, ch. 646, 62 Stat. 967; Nov. 2, 1966, Pub. L. 89-711, §2, 80 Stat. 1105.)

NO. 90-1137

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

AL C. PARKE, WARDEN, PETITIONER,

- versus -

NATHAN VERNON GILLENWATER, RESPONDENT.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

H. DAVID HERMANSDORFER
COUNSEL FOR RESPONDENT
A. SCOTT COBURN

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P. O. Box 1919
Ashland, KY 41105-1919
(606) 329-9759

QUESTION PRESENTED FOR REVIEW

I. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN HOLDING THAT A ONE SENTENCE ORDER OF KENTUCKY'S HIGHEST COURT DENYING DISCRETIONARY REVIEW WAS NOT CLEARLY AND EXPRESSLY BASED UPON PROCEDURAL DEFAULT, PRECLUDING A CAUSE AND PREJUDICE ANALYSIS.

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Goodwin v. Collins, 910 F.2d 185 (5th Cir. 1990). . . . 3, 4, 6

Harris v. Reed, 489 U.S. 255, 190 S.Ct. 1035, 103 L.Ed.2d 308 (1988). . . . . 4, 5, 6, & 7

McQuown v. McCartney, 795 F.2d 807 (9th Cir. 1986). . . 5, 6, 7

Ylst v. Nunnemaker, 904 F.2d 473 (9th Cir.) cert. granted, ____ U.S. _____, 111 S.Ct. 384 (1990). . 7

Rules

Rule 76.20(9)(a) Kentucky Rules of Civil Procedure. 7

OPINIONS BELOW

The Respondent adopts the opinions below as set out in the Petition.

JURISDICTION

The Respondent adopts the jurisdictional statement as set out in the Petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Respondent adopts the constitutional provisions and statutes recited in the Petition, and adds to it as follows:

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, excepting cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person shall be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The Respondent adopts the statement of the case as set out in the Petition, adding to it one relevant fact omitted.

In January, 1981, the Respondent filed a state court Motion to Vacate pursuant to Rule 11.42, Ky. R. Crim. P. [Joint Appendix A-78 - A-96]. The Carter Circuit Court denied the Motion by Order dated March 7, 1981. [Jt. App. at A-76]. The Respondent filed no appeal from that denial and has maintained throughout his second post-trial Motion to Vacate in state court and in the Petition for Writ of Habeas Corpus that he never received the Order denying the Motion. The Respondent continued to believe the Motion had not been disposed of at the time of the filing of his second state court Motion to Vacate.

SUMMARY OF THE ARGUMENT

The Respondent urges that there is no special and important reason for review by this Court of the decision below. The three points raised in support of the Petition are not availing.

First, the opinion of the United States Court of Appeals for the Sixth Circuit is not in conflict with opinions of other circuits. The Petitioner's cited cases are factually and legally distinguishable.

Second, the thrust of this Court's ruling in Harris v. Reed, 489 U.S. 255 109 S.Ct. 1035, 103 L.Ed.2d 308 (1988), is not to focus on the meaning of "judgment," but whether the state court Order bringing the case to the federal judiciary disposed of the matter on grounds of procedural default or upon the merits.

Finally, the Petitioner's citation to Kentucky Rules of Court regarding the definition of discretionary review in that forum is not applicable to the limitation of federal habeas review.

REASONS FOR DENYING THE PETITION FOR WRIT

The Petitioner has asserted that "several" important and special reasons exist for this Court to review the Order of the United States Court of Appeals for the Sixth Circuit. The Petition, however, raises only three arguments, which will be addressed herein seriatim.

I. RESPONSE TO PETITIONER'S FIRST ARGUMENT

The thrust of Petitioner's first and major argument is that the Kentucky Supreme Court's denial of discretionary review without comment, which was found insufficient to raise a procedural bar by the Sixth Circuit Court of Appeals in the instant case,[1] is in conflict with the Fifth Circuit's holding in Goodwin v. Collins, 910 F.2d 185 (5th Cir. 1990). Such conflict does not exist.

The appeal in Goodwin was from a state appellate court which, in a prior proceeding, but not by the last order entered, had found a procedural default. The appeal in the instant case was from the Kentucky Supreme Court which disposed of a petition for discretionary review without comment in a pro forma order. The holding in Goodwin states "[b]ecause of the last state court's reliance on procedural default, we are procedurally barred from reviewing the merits of the claim." 910 F.2d at 187. In the instant case, the Sixth Circuit held, "the Kentucky Supreme Court, in denying discretionary review of Petitioner's second Rule 11.42 motion, did not clearly and expressly base its ruling upon

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[1]The Sixth Circuit opinion, unpublished, is found at page 25a of the Petition.

Gillenwater's procedural default." Petition Appendix, p. 4a.

"[I]n Goodwin," argues the Petitioner, "the intermediate state appellate court rendered a written opinion and the state supreme court simply denied discretionary review without written opinion." [Petition, p. 8]. Based on this statement, the Petitioner concludes that "[t]he facts in the two cases are the same," Id. These statements are not verified in the federal Goodwin opinion.

A review of the opinion in Goodwin fails to reflect that any of its claims, substantive or procedural, were ever presented to the Supreme Court of Texas. The only Texas appellate court reported to have reviewed Goodwin was the Texas Court of Criminal Appeals which, after providing an appeal on the merits, twice thereafter denied discretionary review, without a written opinion in the first instance and without written order in the last state appeal. The federal appeal was from the Texas Court of Criminal Appeals, not the Texas Supreme Court. 910 F.2d at 186.

It is understood to be the Petitioner's argument that (1) the Kentucky Supreme Court was not a "last court rendering judgment" and, (2) a summary denial of discretionary relief by that court was not a decision on the merits (understood as exhaustion of state remedies for federal habeas review purposes.) In terms of Harris v. Reed, 489 U.S. 255, 109 S.Ct. 1035, 103 L.Ed.2d 308 (1988), the "last state court rendering judgment," 489 U.S. at 262, analysis would encompass both the order of the Texas Court of Criminal Appeals in the Goodwin case and the order of the Kentucky Supreme

Court in the instant case:

> "[A] state court that wishes to rely on a procedural bar in a one-line pro forma order easily can write 'relief is denied for reasons of procedural default.' Of course, if the state court under state law chooses not to rely on a procedural bar in such circumstances, then there is no basis for a federal habeas court's refusing to consider the merits of the federal claim." (Citation omitted.)

489 U.S. at 265 n.12.

The Petitioner's reference to the Ninth's Circuit pre-Harris opinion in McQuown v. McCartney, 795 F.2d 807 (9th Cir. 1986), involves a different judicial policy than that announced in Harris. The McQuown decision reflects the former use of presumptive disposition in the Ninth Circuit under which summary denial by the California Supreme Court of an original habeas petition would be deemed a decision on the merits; and, until a state petitioner seeks relief in the state supreme court, he has not exhausted state remedies. 795 F.2d 809. The emphasis was changed by Harris to give the state courts the opportunity and responsibility for specifically declaring when the disposition of a case was made for procedural defaults.

II. RESPONSE TO PETITIONER'S SECOND ARGUMENT

Petitioner's second argument differs little from the first argument except in specificity and is understood to ask (1) "what constitutes a state court rendering judgment" and, (2) "whether a silent order is in fact a judgment." Petition, pp. 9-10. The instructional value of Harris appears to turn on other matters. Viewed from the perspective of a federal court receiving an appeal from the state judicial system, the initial inquiry is whether the

state court's order identifies the case as having been disposed of on grounds of procedural default or upon the merits. The former is the particular concern of the Harris decision, and the dispositive state court order bringing the case to the federal judiciary, whether characterized as a judgment or not, is the object of federal scrutiny.

Petitioner cites the Ninth Circuit opinion in Ylst v. Nunnemaker, 904 F.2d 473 (9th Cir.), cert. granted, ____ U.S. ____, 111 S.Ct. 384 (1990), a post-Harris case, in addition to McQuown and Goodwin, as evidence of uncertainty and conflict among the circuits that a silent state supreme court order is not a decision on the merits. Petition, p. 9. In Nunnemaker, the court found that a disposition without comment of an original habeas petition in the state's highest court could be federally reviewed under Harris. [But not because of any presumption used by the Ninth Circuit to convert such orders into decisions on the merits. See McQuown, 795 F.2d at 809]. The McQuown court found only that a failure to exhaust state remedies occurred where the petitioner had not sought relief in the state supreme court. 795 F.2d at 810. Finally, the Fifth Circuit holding in Goodwin affirmed denial of federal review because of a state procedural default disposition in the appellate court from which the appeal was taken. 910 F.2d at 187.

There is no facial conflict among these opinions from different circuit courts of appeal although each presents differences reflecting local law. The Sixth Circuit permitted

federal review in the instant case from a silent disposition by the Kentucky Supreme Court. Consistent with McQuown and Nunnemaker, the Sixth Circuit did not construe the silence as a decision on the merits or as a decision based upon grounds of procedural default but rather, under Harris, determined that the failure of the state court to elect to specify procedural grounds as the basis for decision was sufficient for federal review.

Petitioner's argument ultimately must be read as saying that the Harris court's reference to the "last state court rendering a judgment," 489 U.S. at 262, is inconsistent with the Harris court's approval of state pro forma orders which succinctly specify denial based on procedural default. 489 U.S. at 265 n.12. Otherwise, its reliance on definitions of "judgment" and "silent order" makes no sense in terms of what the federal judiciary is to do upon receipt of an appeal from the state judiciary; and, we submit, the judicial administrative problems raised by ambiguity in state court orders are of primary significance in Harris, 489 U.S. 264, 265.

III. RESPONSE TO PETITIONER'S FINAL ARGUMENT

Petitioner's final argument asserts that denial of discretionary review by the Kentucky Supreme Court under Ky. R. Civ. P. 76.20(9)(a), "is no different than a denial of a petition for writ of certiorari in this Court." Petition, p. 12. This view is partially correct and applies except where state supreme court actions are subject to review in federal courts. Noteworthy among such exceptions are those state post-conviction criminal cases containing federal claims, which because of

traditional exhaustion of state remedy requirements, must be addressed to the state's highest court. 489 U.S. 262, 263.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

HERMANSDORFER & TEMPLETON

BY: _____

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IN THE
UNITED STATES SUPREME COURT

OCTOBER TERM, 1990

No. 90-1137

AL C. PARKE, WARDEN, PETITIONER,

VS.

NATHAN VERNON GILLENWATER, RESPONDENT.

CERTIFICATE OF SERVICE

I, H. DAVID HERMANSDORFER, a member of the Bar of this Court, hereby certify that on this the 13th day of February, 1991, a true and correct copy of the Respondent's Motion for Leave to Proceed In Forma Pauperis and the Response to Petition for Writ of Certiorari in the above-styled case was mailed, first-class mail, postage prepaid, to Frederic J. Cowan, Attorney General, Capitol Building, Frankfort, Kentucky 40601 and Carol C. Ullerich, Assistant Attorney General, Capitol Building, Frankfort, Kentucky 40601. I further certify that all parties required to be served have been served.

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